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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 305

JOHN N. CRUDUP

vs.

THE STATE OF GEORGIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

JOHN N. CRUDUP,
Pro Se
209-11 Jackson Building
Gainesville, Georgia

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, John N. Crudup, respectfully prays that a writ of certiorari may issue to the Supreme Court of the State of Georgia to review a judgment of that Court affirming a judgment of the Court of Appeals of the State of Georgia affirming a contempt judgment of the City Court of Hall County, Georgia against this petitioner on the 23rd day of February, 1962 by Judge Joseph H. Blackshear of the City Court of Hall County, Georgia.

OPINIONS BELOW.

The majority and dissenting opinions of the Supreme Court of Georgia, rendered on the 4th day of April, 1963 and the Court of Appeals, rendered on the 27th day of September, 1962 are printed in the appendix hereto, infra, pp. 1-21.

JURISDICTION.

The judgment of the Supreme Court of Georgia was entered on the 4th day of April, 1963 and is printed in the appendix hereto. Petitioner then files a petition for rehearing which was denied on the 4th day of April, 1963. The Supreme Court of the United States has jurisdiction to act in such matter by virtue of Title 28, § 1257, U. S. C. A. and Title 28, § 2101, U. S. C. A., because Constitutional questions are involved in the case.

QUESTIONS PRESENTED FOR REVIEW.

1. The facts as herein shown, petitioner contends, were denial of his constitutional rights as provided in the 14th Amendment of the Constitution of the United States as denying due process of law and equal protection of the law. The summary nature of contempt proceedings, the risk of imprisonment without jury, trial or full hearing, make this the most drastic weapon entrusted to the trial judge. To sanction the procedure when it is patent that there has been no interference of any kind with the trial is a denial of due process.

2. Petitioner contends that the sanctioning of the contempt order by the trial judge and the power to successively amend, enlarge, change and elaborate the judgment itself, without a rule nisi or show cause order, without notice of any kind and no opportunity to be heard, respond or object and it being patent that there was no interference with the trial, is a denial of due process of law and of petitioner's rights.

3. These facts, petitioner contends, were denial of his constitutional rights as provided by the 14th Amendment to the Constitution of the United States as he was denied due process of law and equal protection of the laws as embodied in the 14th Amendment to the Constitution of the United States. Petitioner as herein shown, was given no notice or opportunity to be heard prior to the trial court undertaking to amend twice and enlarge the facts upon which the judgment for contempt was based and the original order. This violation of petitioner's rights to due process of law occur

red on two (2) separate occasions after the order was first written by the trial court.

4. Petitioner contends that the trial court failed to adjudge petitioner in contempt of court and that to subsequently draw an order adjudging petitioner in contempt, without notice and opportunity to be heard, is a denial of due process of law.

5. Petitioner contends that the statement by petitioner upon which the judgment for contempt was based was elicited from petitioner by the trial judge and was in response to the court's inquiry; and that the judgment of contempt setting forth that the mere response was contemptuous and predicating the order upon the response when it is patent that the response was proper, is a denial of freedom of speech and due process as provided in the First and Fourteenth Amendments to the United States.

6. The judgment of the Supreme Court of Georgia affirming the judgement of the Court of Appeals of Georgia which affirmed the judgment of the City Court of Hall County, Georgia is in direct conflict with applicable decision of this Court, in particularly In Re McConnell, 82 Sup. Ct. 1288 (1962) and by said action the above State Courts have so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

STATUTE AND RULES INVOLVED

It is submitted by petitioner that the following Code Section was not recited as the basis for the contempt adjudication in the order of the trial court, however; it was mentioned in the brief by defendant-in-error in the Court of Appeals, State of Georgia and in the decision of the Court of Appeals, State of Georgia and is therefore cited.

1. Georgia Code § 24-3323, providing:

"No attorney shall ever attempt to argue or explain a case, after having been fully heard, and the opinion of the court has been pronounced, on pain of being considered in contempt."

STATEMENT OF THE CASE.

On the 23rd day of February, 1962, in the City Court of Hall County, Georgia, before the Honorable Joseph H. Blackshear, Judge of said Court, there came on for trial the case of the State of Georgia versus Marion Smith, same being a criminal accusation wherein the said Marion Smith was accused of the offense of driving an automobile while under the influence of intoxicants. The defendant Marion Smith was represented in said trial by John N. Crudup, who was appointed by the trial Court to represent and defend the accused in said trial, and is hereinafter referred to as petitioner. The trial of said case was before a jury of twelve men in said Court.

During the progress of the trial, and immediately after the State had rested its case, petitioner requested that a witness for the State be recalled for further cross-examination by defense counsel. When this request was made, the Court inquired into the purpose of further cross-examination. Petitioner stated that he wanted to ask the witness if he had not testified there was a woman in the car. The Solicitor then stated that the witness had not so testified. The Court ruled that if said witness was recalled the witness would be a witness for the defendant on trial. Petitioner then stated to the Court that he did not wish to call said witness as his client's witness inasmuch as he had no witnesses to offer and did not wish to forfeit his right to the concluding argument by making this witness a witness for the defendant; the Court then inquired if there was any other testimony the defense desired to offer. Petitioner replied there was none and that he had no witnesses to offer other than the defendant's statement and that he would like to recall the witness, aforesaid, for the purpose of re-cross examination. Whereupon, the Court inquired of petitioner if he knew of any reason why the petitioner should not be adjudged in contempt of court; to this query, petitioner replied that he was not in contempt of the Court; whereupon, the Court then and there levied a fine and sentence upon the petitioner of $10.00 or three (3) days in jail. The Court never adjudged petitioner in contempt of Court during the trial of said case.

Thereafter, on the 26th day of February, 1962, the Judge

of the City Court of Hall County, Georgia, entered a judgment, nunc pro tunc February 23rd, 1962, adjudicating petitioner in contempt of the City Court of Hall County, Georgia, and said judgment was filed in the office of the Clerk of the City Court, Hall County, Georgia on the 27th day of February, 1962. No order to show cause or rule nisi of any description was served upon petitioner prior to said judgment.

Thereafter, within the time prescribed by law, petitioner filed his supersedeas and tendered to said Judge his bill of exceptions, reciting therein the facts as they transpired and specifying as material to a clear understanding of the errors complained of the judgement of contempt. Thereafter, the Judge of said Court refused to unqualifiedly certify said bill of exception and petitioner, on the 17th day of March, 1962, tendered another bill of exceptions to the trial judge. The second bill of exceptions was returned to petitioner with a qualified certificate of said trial judge.

On the 24th day of March, 1962, the trial judge amended his judgment of contempt, amplifying the judgment of contempt and the factual basis of said judgment, and filed said amendment to said judgement on March 24th, 1962.

No rule nisi or notice prior to said amendment was given petitioner, and said amendment to said judgment of contempt was entered without the knowledge of petitioner.

REASONS FOR GRANTING THE WRIT.

I.

THE SUPREME COURT OF GEORGIA HAS DECIDED AN IMPORTANT QUESTION OF LAW IN CONFLICT WITH THE DECISIONS OF THIS COURT AND HAS SO FAR DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEDURE AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF REVIEW.

The Supreme Court of Georgia states in its decision:

> "Upon a careful perusal of the record it is clearly shown that, after being directed by the trial judge to proceed with his defense and call some other witness, counsel instead continued to insist upon his request contrary to repeated adverse rulings by the court. Under such circumstances and mindful of the discretion granted to a trial judge in matters of contempt, we are constrained to the view that the trial judge's adjudication of contempt was not an enormous, flagrant or gross abuse of his discretion."

It must be noted, and this was strongly urged in petitioner's motion for rehearing in the Supreme Court of the State of Georgia, that there was absolutely no admonishing of petitioner at any time. The only thing that is shown was that the trial Court ordered petitioner to proceed with his defense and call some other witness. This was done by the trial Court with full knowledge of, and after a complete and respectful explanation by petitioner that there were no witnesses to be called for the defendant and that all the defendant had to offer was the defendant's statement. It is therefore manifest that petitioner had fully explained to the Court his position with respect to the presentation of the defense and the trial Court had full knowledge of this.

This Court held in the case In Re McConnell, 82 Sup. Ct. 1288 (1962):

> "The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a con-

tempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here."

Petitioner respectfully submits that the McConnell case plainly parallels the case at bar and petitioner unquestionably did nothing to create an obstacle in the performance of judicial duty by the Court, but rather, was an honest, good faith effort to present his client's case. Further citing the McConnell case:

"While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom, or even from conduct so near to the court as actually obstruct justice, it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their client's cases. An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice. To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice, and we think that that power did not extend to this case."

The case at bar possesses characteristics which denote far less vigorous language than that employed in the McConnell case. The case at bar reflects purely and simply an honest good-faith effort by petitioner to carry out the purpose of judicial inquiry. Such conduct could never be construed in any other light, in order to preserve and maintain the kind of trials that our system envisages.

It must be strongly noted here that contempt power is directly premised in the Court's right to conduct its business in "an untrammeled way" when jeopardized by "conduct that tends directly to prevent the discharge of their function". It is therefore manifest, that the trial Court's order must necessarily reveal some factual recitation that would permit this Court to decide whether the trial court committed a gross abuse of discretion.

The Supreme Court of Georgia concludes in its opinion by

stating, "Upon a careful perusal of the record it is clearly shown that, after being directed by the trial judge to proceed with his defense and call some other witnesses, counsel instead continued to insist upon his request contrary to repeated adverse rulings by the court". It is submitted by petitioner that this is a complete misconstruction of the facts of the case. The Supreme Court of Georgia here finds that " - - - counsel instead continued to insist - - -". The accepted definition of the word "instead", is as an alternative or substitute, or in place of the thing mentioned. This would mean in reading the Supreme Court of Georgia's opinion that trial counsel is place of proceeding with the defense and calling another witness again requested permission for cross-examination, or restating it, as a substitute to proceeding or as an alternative to proceeding with he case, trial counsel elected to request cross-examination of the witness. This, of course, is not the correct fractual account of the case. The record clearly shows that trial counsel stated that he did not have any witnesses to proceed with and that the only thing that would be offered for the defense was the unsworn statement of the defendant. This explanation was made to the Court as the record shows and the trial Court was absolutely cognizant of the fact that there were no witnesses to call for the defense. The record clearly shows this. Therefore, to state that " - - - counsel instead continued to insist - - -" is a complete misconstruction of the facts. Petitioner did not do this "instead" but was doing the only thing that was left for him to do. This was not an alternative thing nor was it a substitue. Petitioner had no other course to follow. There was no refusal to abide by the order of the court because there was no other witness to call and was so stated by petitioner. There is clearly no refusal by petitioner to abide by any ruling, order or direction of the trial court and to conclude such is a complete misconstruction of the facts of the case at bar.

The factual account in the trial court's order was absolutely nothing more than three repeated requests and I emphasize the word request. It is manifest and is clearly recognized that the right to perfect the record is absolute and that this right does not extend so far as to permit arguing, remonstrating or insisting upon a right to do something or to pur

sue a line of questioning. However here, there was never any "arguing" by the petitioner or "remonstrating", nor was there ever an "insisting that there was a right to do something" or "to pursue a line of questioning". The record only reveals three repeated requests. A request can never be considered to be arguing or remonstrating or insisting upon a right to do something, for a request is nothing more than asking permission from the Court. The trial judge never directed or ordered petitioner not to make such a request, therefore, no refusal to abide by an order or direction is shown. The fact that the request was made three times does not change the character of the incident without a factual showing that petitioner was committing some act incident thereto or was pursuing a mode of conduct that would justify a ruling of contempt. These things do not appear in the Court's order and in fact did not occur. To hold that three repeated requests in the absence of any other showing, as the record shows in the case, could be contempt of Court will cast a shadow of stagnation upon what we have historically viewed as trial advocacy.

II.

THERE IS A MANIFEST PUBLIC INTEREST IN THE QUESTIONS HERE PRESENTED AND, THE SUPREME COURT OF GEORGIA'S DECISION REFUSES TO FOLLOW APPLICABLE DECISIONS OF THIS COURT.

As was stated by this Court in the case of Fisher v. Pace, 336 U. S. 155; 93 L ed 569:

> "There must be adequate facts to support a summary order for contempt in the presence of the Court".

It is absolutely essential that this Court understand the subject matter upon which the trial court's discretion operated. Courts cannot construe that which does not exist. There are no presumptions in favor of the order and the conclusion of the trial judge cannot cure the failure to recite in detail sufficient facts in the order to constitute contempt of court. The order fails to show disobedience of any ruling. The order fails to disclose any disrespectful conduct or demeanor by petitioner. The order fails to disclose any disruption of the proceeding or disrespect for the orderly pro-

cedure and dignity of the Court. The order fails to show any insolent language used by petitioner. The order fails to show how and in what manner the court was held up to public ridicule. The order fails to disclose any facts that would substantiate disrespectful tone in speech, demeanor or any other conduct. The absence of these facts in the order is because in truth and in fact it did not exist or occur. The order entered forms the only basis for review and this Court cannot construe that which does not exist.

This Court held in the case of Re Green, 8 L ed 2d 198:

"Except for a narrowly limited category of contempts, due process of law requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have chance to testify and call other witnesses in his behalf, either by way of defense or explanation".

The question in the case at bar is whether due process of law requires that notice be given and opportunity be heard prior to the trial court undertaking to amend twice and enlarge the facts upon which the judgment for contempt was based in the original order even though it was purportedly ordered during the trial of a case. Certainly, due process requires notice and opportunity to be heard where, subsequent to the original judgment, conceding it was alledged direct contempt, the trial court amends, enlarges and adds to the original order on two successive occasions.

III.

THERE IS A MANIFEST PUBLIC INTEREST IN THE QUESTIONS PRESENTED AND IMPORTANT AND UNDECIDED QUESTIONS ARE HERE PRESENTED.

This Court held in the case of Wood v. Georgia, 8 L ed 2d 569:

"Freedom of speech and press should not be impaired through the exercise of the power to punish for contempt of court unless there is no doubt that the utterance in

question constitute an imminent, not merely a likely threat to the administration of justice."

Although the Wood case deals with an out of court utterance the principle is no less applicable and petitioner respectfully submits that the freedom of speech invisioned and guaranteed in the first and fourteenth amendments of the Consitution of the United States unequivocally was violated by holding petitioner in contempt of court for having stated, in reply to the court's inquiry if there was any reason why petitioner should not be held in contempt and the reply by petitioner that he was not in contempt of court. There being no evidence that such a reply was disrespectful in tone or in manner nor in any way disrupted the orderly procedures of the Court and the administration of justice. For the trial court to conclude that such a reply, in and of itself, was contemptuous, and no factual showing of any disrespect or disruption of the Court procedures, is patently erroneous. Petitioner respectfully submits that the trial court violated petitioner constitutional right of freedom of speech as embodied in the first and fourteenth amendments to the Constitution of the United States in holding petitioner's reply to be contemptuous.

Further, can it be said that three requests, if so construed, and nothing more, result in a conclusion that the trial Court was prevented from conducting its business in an "untrammeled way"? Can it be said that three requests, if so construed, and nothing more, result in a conclusion that such conduct "tends directly to prevent the discharge of the Court's function?

To conclude such, would be saying that any issue between trial counsel and the Court, if repeated three times, could constitute contempt of Court.

This, of course, petitioner believes, is not what the Court of Appeals nor the Supreme Court of Georgia intended.

The Court of Appeals of Georgia in its headnote opinion said, "When an attorney fails to yield after three rulings of the trial judge adverse to him on the question of recalling a witness for further cross-examination, and insists for the third time on recalling such witness, this court cannot say that the trial judge's adjudication of contempt was a gross, enormous, or flagrant adbust of discretion." Would not the

question then clearly be stated. Did the petitioner, as trial attorney fail to yield? Now the question at hand is whether petitioner "failed to yield". This, we submit, does not appear anywhere in the trial court's order. Failing to yield as applied in the case at bar could not possible mean disobeying an order or command, for no such fact appears. Failing to yield could not mean that petitioner obstructed the administration of justice, for no such fact appears. Failure to yield could not possibly mean that there was conduct which tends directly to prevent to court's discharge of its function, for no such fact appears. We are therefore left with the fact that failure to yield as shown in the case at bar refers to nothing more than making an additional request of the Court. It emphatically does not refer to any act that factually demonstrates contempt.

What is a proper application of Georgia Code Section 24-3323. It must be noted that the Court of Appeals' decision makes specific reference to the Code Section although the trial Court's order does not set forth any reference to Code Section 24-3323. It cannot be questioned that a proper application of this Code Section would demand that some factual holding must be shown demonstrating conduct that would conceivably be embraced within the scope of the statute.

It is further submitted by petitioner that Code Section 24-3323 necessarily contemplates that the "arguing" or "attempting to explain a case" must factually show that this resulted in either direct disobedience to an order or command or resulted in tending to disrupt the administration of justice or tended to prevent the court from discharging its function. It is obvious that Code Section 24-3323 contemplates nothing more than maintaining and preserving the majesty of the law. It is not intended to give rise an unwarranted exercise of judicial power that would completely relegate the trial advocate to a mere whisper in the hall of justice silenced by personal whim clothed in the finery of judicial expediency. It is submitted by petitioner that any other interpretation given to Code Section 24-3323, would, under that section be in direct contravention with those rights guaranteed petitioner under the Federal Constitution

and 14th Amendment thereto, and the Constitution of the State of Georgia, Act 1, Section 1 2-15 paragraph 15.

In conclusion petitioner respectfully submits that the propriety of conduct and demeanor of the trial advocate can not go unchecked or unchallenged—equally as important, and with respect to the case at bar, the exercise of judicial discretion respecting that propriety cannot go unchallenged. Herein lies the balance and the proper concept of judicial determination. As Justic Felix Frankfurther once said in commenting on the seriousness of law, "i do take law very serious, deeply serious, because fragile as reason is and limited as law is as the expression of the institutionalized medium of reason, that's all we have standing between us and the tyranny of mere will and the cruelty of unbridled, undisciplined feeling". This could not be more appropriately stated with respect to the case at bar. The trial advocate's only protection and assurance that he can fulfill his role in the quest for truth in judicial process is that his conduct and demeanor in that quest be governed by established measures. This is all that stands between the trial advocate and the tyranny of mere will and the cruelty of unbridled feeling.

Petitioner submits that he was never adjudicated in contempt of court. The trial court never ordered petitioner to do or not to do anything, but simply inquired of petitioner why he should not be held in contempt after a good-faith explanation had been made of what the proposed offense was to be. To this question, petitioner respectfully, simply and honestly replied that he was not in contempt of court. To this reply there was never an adjudication of contempt by the trial court.

This, in fact, was the sequence of events and to conclude that such a reply by a trial counsel is contemptuous conduct will relegate the trial lawyer to a mere echo in the scheme of justice. As was pointed out by Chief Justice Duckworth of the Supreme Court of Georgia in his dissenting opinion, "for a trial lawyer to fail to assert a position so fundamental would certainly be a dereliction of the duty imposed upon a trial lawyer."

The concept of the role of the trial advocate and the concept of the administration of justice are compatible and are

blended together and en massed in the whole system of jurisprudence and until the conduct of the trial attorney appears to be incompatible and in conflict with the concept of the administration of justice it can never be said that such conduct is contemptuous, but, to the contrary, is in furtherance of the pursuit of truth.

CONCLUSION.

The ruling of the Supreme Court of Georgia and the Court of Appeals of Georgia in the case at bar is manifestly erroneous and against public policy, and raises a serious question in the administration of justice in our court system. The questions presented are of paramount public importance because, as shown by the instant record, unless a lawyer is permitted to vigorously assert the duty imposed upon him as a trial advocate, a defendant can never fully assert his rights in the courts. Not only is the trial advocate's role rendered meaningless and void, it is certainly consequential that the defendant will not receive a fair trial. Under the ruling in this case, it is impossible for a lawyer, as a trial advocate, to perform the duty imposed upon him without running the risk of a jail sentence. To condone such will stagnate trial advocacy.

It is therefore respectfully urged that, not only because of the rights of this petitioner, but for the reason of the manifest public interest in the questions presented, this petition for a write of certiorari should be granted.

Respectfully submitted.

John N. Crudup

JOHN N. CRUDUP,

Pro Se

CERTIFICATE OF SERVICE

I, JOHN N. CRUDUP, counsel of record and named as petitioner in the foregoing petition for writ of certiorari, do hereby certify that I have this day served a copy of the within and foregoing Write of Certiorari upon C. Ernest Smith, Solicitor of the City Court of Hall County, Georgia and upon Eugene Cook, Attorney General, State of Georgia and upon Hughel Harrison, Assistant Attorney General, State of Georgia by mailing a copy of same to them in a properly addressed and adequately stamped envelope to cause the same to be delivered to them in due course of United States mail.

This 22 day of July, 1963.

John N. Crudup

John N. Crudup

APPENDIX.

Case No. 21923 Decided: APR 4 1963

SUPREME COURT OF GEORGIA No. 606

CRUDUP v. THE STATE

QUILLIAN, Justice. This case arose out of the citation for contempt of an attorney, John N. Crudup, by the Judge of the City Court of Hall County. On grant of certiorari, we review the judgment of the Court of Appeals affirming the trial judge, Crudup v. State, 106 Ga. App. 833 (129 SE2d 483).

The relevant facts as set out in the citation for contempt as stated by the trial judge are as follows:

After counsel had, on numerous occasions, asked repetitious questions on cross-examination of the State's witnesses despite the admonition of the trial judge, the State rested. Whereupon counsel requested that a witness be recalled for the purpose of cross-examination as to a particular point. The judge ruled that the witness could not be recalled for cross-examination, but that he could be called as a witness for the defendant. Counsel stated he did not wish to call the witness for the defendant, "but wanted to recall him about his testimony while on the stand." The judge again ruled that the witness could not be recalled for the purpose stated and "direct[ed] Attorney Crudup to proceed with his defense and call so... other witness." Counsel stated he had no other witness "except the defendant would make a statement," but that he wanted to put the witness in question back on the stand. The judge again stated to counsel that he could call the witness for the defendant, but could not recall him for further cross-examination to ask him what he testified to earlier in the trial. Counsel then again stated he did not want to call the witness as a witness for the defendant but persisted in his request to recall him for cross-examination as to his testimony given earlier in the trial. At this point, the judge asked counsel if he had any reason to give why he should not be punished for contempt of the court in failing and refusing to abide by the rulings of the court that the

witness could not be recalled for the purpose he was insisting on. Counsel replied that "he was not in contempt of court." Held:

"The power to punish contempts is inherent in every court of record."

Bradley v State, 111 Ga. 168 (36 SE 630). See also Plunkett v. Hamilton, 136 Ga. 72 (70 SE 781); Atlanta Newspapers v. State 216 Ga. 399, 402 (116 SE2d 580). There is no question that every court has the power to preserve and enforce order in its immediate presence, and as near thereto as is necessary to prevent interrupton, disturbance, or hinderance to its proceedings; that this includes the power to compel obedience to its judgments, orders and process, and to control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto. Code § 24-104. See also Code Sec. 24-105. Further, no attorney shall ever attempt to argue or explain a case, after having been fully heard, and the opinion of the court has been pronounced, on pain of being considered in contempt. Code Ann. § 24-3323 (formerly Code Sec. 24-3306).

Upon a careful perusal of the record it is clearly shown that, after being directed by the trial judge to proceed with his defense and call some other witness, counsel instead continued to insist upon his request contrary to repeated adverse rulings by the court. Under such circumstances and mindful of the discretion granted to a trial judge in matters of contempt, we are constrained to the view that the trial judge's adjudication of contempt was not an enormous, flagrant or gross abuse of his discretion. Cabot v. Yarborough, 27 Ga. 476; Remley v. DeWall, 41 Ga. 466 (5); Hayden v. Phinizy, 67 Ga. 758 (2); Salom v. State, 101 Ga. App. 905 (1) (115 SE2d 447). See also Carson v Ennis, 146 Ga. 726, 728 (1) (92 SE 221); Garland v. State, 101 Ga. App. 395, 401 (6), and the dissent at page 427 (114 SE2d 176).

Judgment affirmed. All the Justices concur, except Duckworth, C. J., Head, P. J., and Candler, J., who dissent

21923. Crudup v The State

DUCKWORTH, Chief Justice, dissenting.

While the purported amendment of the contempt judgment contains extensive recitals of the conduct of the contemnor in repetitious cross-examination of the State's witnesses, and arguments of the judge that such conduct was very obnoxious to him, yet the specific matter upon which the contempt judgment is based is a request, repeated four times couched in perfectly respectful and proper language, to be allowed to recall a State's witness and have him say whether or not he had testified that there was a woman in the car, and to each of such requests the judge said he could recall the witness but he would have to adopt him as a defense witness. I wonder, with all other matters recounted by the judge, just what he asked the attorney to speak about when he asked if he wished to show why he should not be punished for contempt? Was he intending that the attorney account for his conduct throughout the trial? While summary punishment for contempt in the presence of the court is permissible, this does not authorize a judgment for contempt without specifying the grounds thereof. The judge's order recites that the matter sought to be asked the witness was irrelevant, yet his same order recites that he authorized counsel to recall the witness for the sole purpose of asking him about it, provided only he pay the stated price thereof of adopting a deputy sheriff, a State's witness, as the witness of the accused. These recitals preclude any claims that the reason for denying the request was that the testimony would have been irrelevant. Then in the face of the indisputable fact this was a criminal case where the defendant pleads nothing but "not guilty," and the recited fact that the defendant had offered no evidence, the judge asserts that neither the State nor the accused contends that there was a woman in the car. Where did the judge discover the contentions of the accused when to this point he had made none except "not guilty"? These recitals of the judge show unmistakably his unfairness to the attorney. The admitted fact that the solicitor stated in the hearing of the judge and jury that the witness had not so testified, and counsel for the accused replied that he had so testified,

vividly demonstrated to the judge that there was disagreement as to the witness' testimony. If the court was conducted as all courts should be, its sole object was to discover the truth from the purest sources. Code § 38-101. The only pure source here was the witness himself. Since the judge had allowed the solicitor to violate the law by stating what the witness had not said, apparently without thinking of holding him in contempt, counsel for the accused would not have been counsel for the accused as required by the Constitutions, State and Federal, had he not insisted, until ordered to desist, upon protecting his client against the injury inflicted by the solicitor.

It is apparent that the contempt judgment was based upon alleged prevention of the orderly dispatch of court business. A second thought, as shown by the attempted amendment, was to charge him with violating Rule 23, found in Code Ann. § 24-3323. The first charge is obviously groundless since requests for permission to call a witness are proper and necessary parts of a trial. And the second is invalid because, first, by his repeated replies to the request, the judge had authorized the repeated requests, hence, they were made with the court's permission, and in the second place, what the attorney did was not an "attempt to argue or explain a case," which are only acts specified by the rule as constituting grounds for contempt. What he did was neither argument nor explanation. It was an humble request. The judge recites that he failed to purge himself of contempt, yet the record shows conclusively that he had not been adjudged in contempt, and no act of his had been specified as contemptuous. Counsel did nothing that the court had ordered him not to do. The solitary portion of the request that was denied was that the witness be on cross-examination. The judge's refusal was never violated. In this part of the request the attorney was clearly within the rights granted by law. In Long v. State, 12 Ga. 293, at pages 330, 331, this court speaking through one of its ablest Justices, Justice Nesbit, said: "Yet it is certainly the business of court, when practicable, to correct the misrepresentations of the testimony by counsel, particularly when that counsel is in conclusion. And it is practicable, when the witness whose evidence is charged

to be misrepresented, is in Court. He ought to be called to say what he did testify." Here counsel for the accused charged that the solicitor had misrepresented the evidence of a witness who was in court. The request of counsel for the accused was that he be called to say what he did testify. Instead of being granted as Judge Nesbit said should be done, it was, because of its repetition, made the sole ground for punishing counsel for contempt. How far can justice change?

I happen to know Judge Blackshear, and know him to be a capable and honorable judge, but even so, he is human, and subject, as we all are, to err. My very severe criticism of this contempt judgment is not intended to in any way, even by implication, reflect unfavorably upon the personal, professional or official character of the judge, but only to say that in this case he was in my opinion 'trigger happy' to throw his judicial weight against a highly respectful lawyer and thereby unjustly humiliate him and place a black mark upon his honorable prefessional record. For this court to affirm that judgment is an open invitation to tyranical judges to shackle the legal profession and thereby deny litigants the benefit of counsel.

During the more than 24 years I have served here, the Supreme Court has never punished a single lawyer for contempt, and the same lawyers that practice before the Supreme Court practice before the trial courts. Power to punish for contempt is essential and should be exercised in all cases where necessary, but it is not a power that should be carelessly exercised, or to intimidate lawyers in the discharge of their important duties. I hope the bare majority of 4 to 3 that rendered this judgment will eventually change, and a decision can be rendered by this court making it clear that every judge does not have the authority to arbitrarily punish a lawyer every time he chooses without substantial facts showing a necessity therefor in order that the court's business might be conducted orderly and without unwarranted interference.

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I am authoribed to state that Mr. Justice Chandles concurs in this dissent.

When an attorney fails to yield after three rulings of the trial judge adverse to him on the question of recalling a witness for further cross-examination, and insists for the third time on recalling such witness, this court cannot say that the trial judge's adjudication or contempt was a gross, enormous, or flagrant abuse of discretion.

This is an appeal from an order of the trial judge adjudicating the plaintiff in error in contempt of court. It states in part: "John N. Crudup, the defendant's attorney, then called to a Court Bailiff to bring in Deputy Sheriff Fuller. The court inquired of Attorney Crudup if he overlooked something when Witness Fuller was on the witness stand and Attorney Crudup stated that he wanted to recall Witness Fuller and ask him if he didn't testify that a woman was in the car with the defendant at the time of the occurrence. The Court ruled that Witness Fuller could not be recalled for such further cross-examination and that the Jury would know what he testified but the witness could be called as a witness for the defendant. Attorney Crudup stated he did not want to call Witness Fuller as a witness for the defendant but wanted to recall him about his testimony while on the stand. The Court again ruled that Witness Fuller could not be recalled for the purpose stated and directed Attorney Crudup to proceed with his defense and call some other witness. Attorney Crudup stated he had no no other witness except the defendant would make a statement but that he wanted to put Witness Fuller back on the stand. The Court again stated to Attorney Crudup that he could call Witness Fuller to the stand to testify as a witness for the defendant but could not recall him for further cross-examination to ask him what he testified to earlier in the trial. Attorney Crudup then again stated he did not want to call Witness Fuller as a witness for the defendant but persisted in his request to recall him for cross-examination as to his testimony given earlier in the trial and if he didn't testify that a woman was in the car at the time of occurrence." (Emphasis supplied) *** "At this point the Court asked At-

torney John N. Crudup if he had any reason to give why he should not be punished for contempt of the Court in failing and refusing to abide by the rulings of the Court that the witness could not be recalled for the purposes he was insisting on. Attorney John N. Crudup thereupon replied to the Court that he was not in contempt of the Court. Attorney John N. Crudup having thus failed and refused to abide by the rulings of the Court that Witness Fuller could not be recalled for further cross-examination regarding matters to which he had or had not testified earlier in the case, and having refused to abide by the Court's ruling that the jury would remember the evidence, and Attorney John N. Crudup having persisted repeatedly in refusing to abide by the rulings of the Court and insisting on recalling the witness for the purposes aforesaid, and the Attorney's conduct being repeated and the Attorney John N. Crudup having failed and

1. Canon 1, The Canons of Professional Ethics of the American Bar Association, states: "It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. . . ." Adopted by the Georgia Bar Association, May 29, 1947. Report, Georgia Bar Association, 1947, pp. 51,151, 328.

2. Canon 15, The Canons of Professional Ethics of the American Bar Association, states: "The lawyer owes 'entire devotion to the interest of the client,' warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for his client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client." Adopted by the Georgia Bar Association, May 25, 1947, Report, Georgia Bar Association, 1947, pp. 51, 151, 332.

refused to purge the contempt after opportunity to do so, and said Attorney having stated to the Court that he was not in contempt after having been so adjudged, the Court now in the exercise of a sound judicial discretion does consider, order, and adjudge that John N. Crudup an Attorney at Law, has wilfully and intentionally conducted himself in contempt of the Court and in defiance of the Court, and that it is necessary in order to carry on the administration of justice, preserve order and decorum in the Court and to enforce due respect to the Court's orders and rulings . . ." (Emphasis supplied).

HALL, Judge. 1. In Garland v. State, 99 Ga. App. 832 (SE), this court held that a judgment of contempt must contain "factual holdings setting out the misconduct on the part of the attorney such as will disclose to a reviewing court the subject matter upon which the discretion of the trial court operated." The judgment in this case meets that test.

2. The reconciliation between an attorney's duty to maintain respect due the courts 1 and his duty to protect and advance the interests of his client. 2 may prove to be at times difficult.

Nevertheless, it is basic that even as to laymen ignorance of the law is no excuse. Code § 102-105. Surely this applies with even greater force to an attorney who is a member of one of the three "learned professions." Accord, Georgia Board of Optometry v. Friedman, 183 Ga. 669, 673 (SE). Few cases are found adjudicating the question of contempt by an attorney in disobeying the rulings of the Court. We believe this indicated that generally lawyers and judges accord great respect to the authority, duties, and rights of each other and the vital role of each in the judicial process.

The Act establishing the City Court of Hall County (Ga. L. 1890-91, p. 939, as amended by Ga. L. 1916, p. 225, 228), provides that the court shall be a court of record, have the same rules of procedure and practice as the Superior Courts of the State unless otherwise provided in the Act, and that the judge shall have the same power to enforce his orders, to preserve order, to punish for contempt, and to enforce

all his judgments as is vested by law in the judges of the Superior Courts of the State.

Code § 24-104 provides: "Every court has power 1. To preserve and enforce order in its immediate presence, and as near thereto as is necessary to prevent interruption, disturbance, or hindrance to its proceedings. . . . . 3. To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding therein. . . . 4. To control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto." The power to punish contempts is inherent in every court of record (Atlanta Newspapers, Inc. v. State of Georgia, 216 Ga. 399 (1) (SE)) and, under Code § 24-104, "every court, whether a court of record or not, has power to punish for contempt committed in its immediate presence." Plunkett v. Hamilton, 136 Ga. 72 (1) (SE); Brooks v. Sturdivant, 177 Ga. 514, 516 (SE); Watson v. Dampier, 148 Ga. 588 (1) (SE); Rapalje, Contempt, p. 1.[3] Rule 23 of the Rules of the Superior Courts (Code § 24-3323) specifically provides: "No attorney shall ever attempt to argue or explain a case, after having been fully heard, and the opinion of the court has been pronounced, on pain of being considered in contempt."[4] Accord, 17 C.J.S. 35, § 25 (b). "The majesty of the law must be maintained: its mandates must be implicitly obeyed." Mays v. Willingham, 37 Ga. App. 478, 480 (SE).

Contempt of court has been variously defined; in its broad sense it means disregard for or disabedience of the order or

3. "We start with the premise that the right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government and that courts necessarily must possess the means of punishing for contempt when conduct tends directly to prevent the discharge of their functions." Wood v. Georgia, ____ U.S. ____ (____ Sup. Ct. ____).

4. Rule 23 (Code §24-3323) was present in the Code of 1910 as §6265; was incorporated in the amendment of 1916 (Ga. L. 1916, p. 225, 228) to the Act establishing the City Court of Hall County and is applicable in the present case. Chance v. State, 97 Ga. 346 (SE).

command of the court, but "it also includes interruption of the proceedings . . ." 12 Am. Jur. 389, Contempt, § 2. Contempt or court, as a punishable offense, is as old as are courts themselves. 4 Blackstone's Commentaries 284. This is especially true in the case of criminal contempt where the court exercises a disciplinary and summary jurisdiction over attorneys and other officers of justice. Fox, History of Contempt of Court 3, 156-157, 5 Care must be taken however to distinguish between cases of contempt in facie curiae and those involving an out-of-court statement. The latter involves the constitutionally guaranteed liberty of free expression and the power of courts to punish for such contempts is limited to cases in which there is a "clear and present danger to the administration of justice." McGill v. State, 209 Ga. 500, 505 (, SE); Wood v. Georgia, U.S. (Sup. Ct.); Bridges v. California, 314 U. S. 252 (62 Sup. Ct. 190); Pennekamp v. Florida, 328 U. S. 331 (66 Sup. Ct. 1029); Craig v. Harney, 331 U. S. 367 (67 Sup. Ct. 1249). The former involves the inherent power of courts "to maintain order in their court rooms and to assure litigants a fair trial . . ." Wood v. Georgia, U. S. (Sup. Ct.). It "is absolutely essential to the protection of the courts in the discharge of their functions." White v. George, 195 Ga. 465, 470 (SE). "As an incident to their being, courts must have the authority 'necessary in a strict sense' 6 to enable them to go on with their work. In doing their work, courts, like others, may encounter obstructions. They must, therefore, be vested with incidental powers of self-protection . . . Some action is necessary to enable the court to proceed with its affairs . . . This manifestation of a court's activity is not a mystical emanation . . .; it is referable solely to the fact that a court has business at hand and must get on with it." Frankfurter and Landis, "The Power to Regulate Contempt," 37 Harvard Law Review, 1010, 1022. In summary, the interference with the immediate process of litigation may be treated by the presiding judge as a facie curiae contempt. Ex parte Terry, 128 U. S. 289 (, Sup. Ct.).

5. "The twentieth Article of John's Magna Carta does not extend to officers of justice, whose amercements are assessed by the Court and not by the jury."

Questions of contempt are for the court treated with contempt, and the trial court's adjucation of contempt will not be interfered with unless there is a gross, enormous, or flagran abuse of discretion. Salem v. Georgia, 101 Ga. App. 905 (1) (SE); Garland v State, 101 Ga. App. 395, 401 (SE); Cabot v. Yarborough, 27 Ga. 476 (SE); Remley v. DeWall, 41 Ga. 466 (SE); Hayden v. Phinizy, 67 Ga. 758 (SE); Warner v. Martin, 124 Ga. 387 (SE); Mays v. Willingham, supra.

The judgment here shows that the contemnor attempted to recall a witness for the purpose of further cross-examination and that upon ascertaining the purpose of such recall the trial judge ruled adversely to the contemnor on this point, but stated that the witness could be called as a witness for the contemnor's client. The contemnor insisted upon recalling the witness for the purpose of further cross-examination. The trial judge again ruled adversely to the contemnor on the same question and directed him to proceed with his defense. The contemnor again insisted upon recalling the witness. The trial judge again ruled for the third time adversely to the contemnor on the same question. The contemnor again insisted for the third time (after three previous rulings on the same question) upon recalling the witness. By virtue of the foregoing rules of law, and with specific reference to Code §24-3323, and under the record in this case, we cannot say that the trial judge's adjucation of contempt was a gross, enormous or flagrant abuse of discretion. Garland v. State, 101 Ga. App. 395 (SE). 7

The fact that the trial judge did not adjucate the contemnor in contempt until afer he had given him an opportunity to make a statement as to why he should not be held in contempt is of no consequence. Undoubtedly this delay was a "wise exercise of discretion . . . to allow the con-

6. Holmes, J., in Craig v. Hecht, 263 U. S. 255, 280, 281 (Sup. Ct.).

7. Even the dissenting opinion (p. 421) in the Garland case concedes that "A lawyer is required by the rules of court to yield, without further argument, to any order or ruling of the judge in whose presence he is. Failure to do so is contempt."

temnor an opportunity to mitigate his offense by showing that no contempt was intended, or any other mitigating circumstances, except in cases where there would be no excuse for the action of the contemnor." White v. George, 195 Ga. 465, 470-474 (SE); Ex parte Kearney, 7 Wheat 38 (5 L. ed. 391). In "all ordinary matters an advocate must, even more than ordinary persons, since he has a special privilege to practice law, conform himself to the usages of the Court and the rulings of the Judge." Oswald's Contempt of Court, p. 54-55. Being an officer of the court, a member of a learned profession and fully cognizant of Code Section 24-3323, the contemnor needed no specific warning to cease persisting in his argument in view of the three previous rulings of the court that the witness could not be recalled for furter cross-examination. He needed no further protection for his client than an adequate record. Even if the trial judge was in error on his first ruling, it was the duty of counsel to abide by the first and subsequent rulings; and if any right of his client was violated, the remedy was by writ of error. "Any other procedure would result in mockery of our trial courts and would destroy every concept of orderly process in the administration of justice." Fisher v. Pace 336 U. S. 155, 162 (Sup. Ct.).

We have not overlooked the case of In Re McConnell, U. S. (Sup. Ct.). It is not controlling here for the reason that it merely involved the "exercise of" the Supreme Court of the United States' "supervisory power" over inferior federal courts. Furthermore

8. a. The federal courts have no statue similar to Code §24-3323.

b. There being no similar statute, the contempt was based on the alleged improper language of the attorney as being an actual obstruction of justice.

c. It is clear from In Re McConnell that the inferior federal courts, as distinguished from Georgia courts of record, are "limited in contempt cases, to 'the least possible power adequate to the end proposed' "

d. There was a real issue in In Re McConnell as to whether it was necessary under the Federal Rules of Civil Procedure for the attorney to pursue the questioning which the judge had forbidden in order to perfect his record for appeal.

it is distinguishable from the present question on several grounds. 8/

It matters not what we individually might have done under the circumstances if we were siting as the trial judge. The trial judge has a wide discretion in regulating and controlling the business of the court and the conduct of the trial. Atlanta Newspapers, Inc. v. Grimes, 216 Ga. 74 (SE); Banister v. Hubbard, 82 Ga. App. 813 (SE); Jackson v. Moultrie Production Credit Association, 76 Ga. App. 768 (SE). We have no discretion and must follow what Chief Justice Sir Edward Coke called the "seraight metewand of the law."

We must also remember that ours is an adversary system and that the two opposing attorneys are partisan advocates. Confidence and power is reposed in the trial judge to administer the business of the court in a non-partisan manner. Such occurrences as we have in this case must be viewed as a unit in order to appraise properly the alleged misconduct. The relationship of the contemnor as an officer of the court must not be lost sight of and reliance must be placed upon the fairness and objectivity of the presiding judge. Fisher v. Pace, supra, p. 161; accord, Garland v. State, 101 Ga. App. 395, 416-417 (SE). It is axiomatic that, if we do not uphold the trial judges in this State in the proper exercise of their discretionary power to control recalcitrant attorneys, they will control our trial judges.

Judgment affirmed.

Carlisle, P. J., Bell, Frankum, Jordan, Eberhardt and Russell, J. J., concur.

Felton C. J., and Nichols, P. J., dissent.

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FELTON, Chief Judge, dissenting.

I have no quarrel with the very fine and studious opinion prepared by Judge Hall except that I wish that we could store it away and use it in a case where it is applicable

to the facts, as I do not think is the case here.

The original contempt order; and that is the only one mentioned in the opinion, does not allege one single thing which Mr. Crudup did which was in the slightest degree contumacious or which tended in the remotest degree to obstruct the administration of justice. A mere reading of the order will prove this to be true. Mr. Crudup stated to the court three times what he wanted to do. The court, instead of telling Mr. Crudup not to make he statement again, kept on repeating what he had been saying and when Mr. Crudup repeated himself the fourth time, one time less than the Judge, the Judge asked Mr. Crudup if he had any reason to give why he should not be punished for contempt and Mr. Crudup said he was not in contempt. The court construed his last statement as adjudging Mr. Crudup in contempt and ruled that Mr. Crudup refused to purge the contempt after opportunity to do so. There was no judgment of contempt until the written order and the record does not show any refusal by Mr. Crudup to purge himself after opportunity. The attorney did not violate any discretion of the court. He did not disobey any order because he did not call the witnesses again to the stand for the purpose of cross-examination after the Judge ruled that he could not. I think that before the Judge could hold Mr. Crudup in contempt he would have had to rule that he could not again make the request to call the witness for cross-examination. The court left the door open for two additional requests and I do not see how Mr. Crudup could have known the limit without the Judge's first telling him. The rule of court embodied in Code § 24-3323 has no application to the facts of this case and so far as appears from the record, the judge did not base his order on it in whole or part. The McGill case means, in my opinion, that the Federal rule is about the same as Georgia's and a recent opinion of the U. S. Supreme Court fits this case like a glove. The case is: In the Matter of Criminal Contempt of Thomas C. McConnell, Petitioner, No. 498, decided June 18, 1962. The opinion is as follows: "MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner Thomas C. McConnell, a lawyer, was sum-

marily found guilty of contempt of court for statements made while representing the Parmelee Transportation Company in an antitrust suit for treble damages and an injunction. The complaint charged that a number of defendants had unlawfully conspired to destroy Parmelee's business by restraining and monopolizing trade in violation of the Sherman Act. Petitioner and his co-counsel, Lee A. Freeman, had done extensive pretrial preparation on the issue of conspiracy which was the heart of their case. At the very outset of the trial, however, the district judge on his own motion refused to permit counsel to try to prove their conspiracy charge, holding that they must first prove in a wholly separate trial that defendants' actions had resulted in an economic injury to the public — an erroneous holding since we have held that the right of recovery of a plaintiff in a treble damage antitrust case does not depend at all on proving an economic injury to the public.

"Cut off by the judge's erroneous ruling from trial of the basic issue of conspiracy, and wishing to provide a record which would allow this ruling to be reviewed by the Court of Appeals, counsel for Parmelee asked counsel for defendants to stipulate that plaintiff would have introduced certain evidence of conspiracy had it been allowed to do so. Defense counsel refused to stipulate, however, insisting that Parmelee's counsel prepare their record by following the procedure set out in Rule 43 (c) of the Federal Rules of Civil Procedure, which requires that before an offer of proof is made questions upon which the offer is based must first be asked in the presence of the jury. Unwilling to risk dismissal of their appeal for failure to follow Rule 43 (c), Parmelee's counsel proceeded to produce and question witnesses in the presence of the jury in order to lay the proper foundation for their offers of proof of conspiracy. But during the process of this questioning the judge ordered it stopped and directed that any further offers of proof be made without first having asked questions of witnesses in the presence of the jury. This ruling placed Parmelee's counsel in quite a dilemma because defense counsel was still insisting that all offers of proof be made in strict compliance with Rule 43 (c) and there was no way of knowing with certainty whether the Court of Appeals would treat the trial court's order to

dispense with questions before the jury as an excuse for failure to comply with the Rule. Petitioner therefore not only sought to make clear to the court that he thought defense counsel's objection was 'right' but also repeatedly insisted that he be allowed to make his offers of proof in compliance with the Rule. Following the trial the judge charged petitioner and his co-counsel in a number of specifications with being guilty of contemptuous conduct during the course of the trial. After separate hearings both lawyers were summarily found guilty by the trial judge on all specifications. Both appealed to the Court of Appeals, which reversed all of Freeman's convictions, reversed two of petitioner McConnell's convictions, but, with Judge Duffy dissenting, sustained the conviction of petitioner on Specification 6 — the specification based on petitioner's insistence that he be allowed to make offers of proof in compliance with Rule 43 (c). Even as to this conviction, however, the Court of Appeals held that the jail sentence imposed by the trial judge should be reduced to a fine of $100. As in Offutt v. United States, the 'importance of assuring alert self-restraint in the exercise by district judges of the summary power for punishing contempt' prompted us to bring the case here.'

"The statute under which petitioner was summarily convicted of contempt in 18 U. S. C. § 401, which provides that: 'A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as — (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice . . .' This section is based on an Act passed in 1831 in order to correct serious abuses of the summary contempt power that had grown up and was intended as a 'drastic delimitation . . . of the broad undefined power of the inferior federal courts under the Act of 1789,' revealing 'a Congressional intent to safeguard Constitutional procedures by limiting courts, as Congress is limited in contempt cases, to "the least possible power adequate to the end proposed." "The exercise by federal courts of any broader contempt power than this,' we have said, 'would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a

jury.' And was held long ago, in Ex parte Hudgings, that while this statute undoubtedly shows a purpose to give courts summary powers to protect the administration of justice against immediate interrupton of court business, it also means that before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice: 'An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest.' This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted . . .' Thus the question in this case comes down to whether it can 'clearly be shown' on this record that the petitioner's statements while attempting to make his offers of proof actually obstructed the district judge in 'the performance of judicial duty.'

"The Court of Appeals answered this question by sustaining Specification 6 only on the basis of petitioner's last sentence in the colloquy set out in the specification. That specification reads: 'On April 27, 1960, in the presence and hearing of the jury, after the Court had instructed the attorneys for plaintiff to refrain from repeatedly asking questions on subjects which the Court had ruled was not admissible, in the presence of the jury as distinguished from an offer of proof outside the presence of the jury, the following occurred: "By Mr. McConnell: Now you are trying to tell us we can't ask these questions. We have a right to ask these questions, and until we are stopped from asking these questions we are going to ask them, because it is in our prerogative in doing it. By the Court: I am now stopping you from asking the questions about conversations with Mr. Cross, because I have ruled specifically, definitely and completely that it is not an issue in this case. By Mr. McConnell: We have a right to ask them. By the Court: You can offer proof on it. By Mr. McConnell: We have a right to ask questions which we offer on this issue, and Your Honor can sustain their objection to them. We don't have a right to read the answers, but we have a right to ask

the questions, and we propose to do so unless some bailiff stops us.' (Emphasis added.)

"The record shows that after this colloquy petitioner's co-counsel asked for a short recess, that following this recess petitioner did not continue to ask questions which the judge had forbidden and that in fact he did not ask any more such questions again throughout the remainder of the trial. We agree with Judge Duffy who dissented below that there was nothing in petitioner's conduct sufficiently disruptive of the trial court's business to be an obstruction of justice. It is true that petitioner stated that counsel had a right to ask questions that the judge did not want asked and that 'we propose to do so unless some bailiff stops us.' The fact remains, however, that the bailiff never had to interrupt the trial by arresting petitioner, for the simple reason hat after this statement petitioner never did ask any more questions along the line which the judge had forbidden. And we cannot agree that a mere statement by a lawyer of his intention to press his legal contention until the court has a bailiff stop him can amount to an obstruction of justice that can be punished under the limited powers of summary contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here.

"While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom, or even from conduct so near to the court as actually to obstruct justice, it is also essential to a fair administration of justice that lawyers be able to make honest good faith efforts to present their clients' cases. An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice. To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice, and we think that that power did not extend to this case. Reversed."

When Mr. Crudup presented his bill of exceptions for certification the Judge insisted on his including therein facts

not stated in the first order of contempt and thereafter amended his first order, nunc pro tunc, without hearing or notice, as follows: "For the record in this case to be complete and sufficient for review and to specify with particularity the conduct of John N. Crudup, Attorney at Law, constituting the contempt of court, the Judgment of contempt pronounced during the trial on February 23, 1962, at the February 1962 Term of court and entered nunc pro tunc on February 26, 1962, for February 23, 1962, is now, during the same February 1962 Term of this court, amended to complete and specify the record as follows:

1. The matters and things set forth in the Judgment of Contempt of Court in the case of The State of Georgia versus John N. Crudup entered nunc pro tunc, now February 26, 1962 for then February 23, 1962 transpired during the public trial of The State of Georgia versus Marion Smith the defendant being represented by John N. Crudup, Attorney at Law, and that same occurred on February 23, 1962, during the present February 1962 Term of this Court, and in said public trial and before a jury of twelve men, spectators in the court room, officers and attorneys, and before the Trial Judge. 2. Witness Fuller did not testify during the trial that a woman was in the car with defendant at the time of the occurrence as contended by Attorney John N. Crudup. Neither the State nor the defendant Marion Smith contended a woman was in the car with the defendant, and testimony on the subject was neither material nor relevant to any issue in the case and would neither have aided nor harmed anyone. The repeated insistence of Attorney John N. Crudup to recall Witness Fuller and ask him what he testified while on the stand and if he didn't testify earlier in the trial that a woman was in the car with the defendant at the time of the occurrence was in repeated disobedience, resentment and resistence to the opinion and ruling of the Court previously announced and made, that the witness could not be recalled for cross-examination and that the jury would know what he testified, and was a contempt of court by arguing and quarreling with the trial judge after the opinion and ruling of the court had been pronounced, and after Attorney Crudup had been fully heard, and all of which was

known to Attorney Crudup and of which he was made fully aware by the Court. Such conduct of Attorney John N. Crudup was contemptuous and knowingly, wilfully and intentionally done to interfere with and impede the trial and in disrespect to the Court and the Court's rulings. 3. Said misbehavior and contempt of court by Attorney John N. Crudup made necessary that he be then and there adjudged in contempt of court and punished in order that the trial Judge could control the judicial proceedings and protect those proceedings from disruption, interference and obstruction during the trial, and in order to maintain respect for the Court. 4. Said contempt of court by John N. Crudup was committed in the immediate presence of the court and in the immediate presence of a jury of twelve men, court officers, and spectators during a public trial and was such conduct as tended to hold the court up to public ridicule. All rulings of the court were made in the presence of and known to Attorney John N. Crudup, the judgment of contempt was made in his presence in the court room during the proceedings, the opportunity to purge himself of contempt was fully afforded him, and he declined to purge the contempt after opportunity. The Court thereupon sentenced Attorney John N. Crudup to pay a fine of ten dollars or serve three days in jail. This punishment was necessary and reasonable. Shortly thereafter and on the same day, February 23, 1962, Attorney John N. Crudup came to the trial Judge, stated he wanted to pay the ten dollar fine and asked if he could be granted time to go to his office to get the money. His request was granted but the following day it became known that he did not pay the fine. Attorney Crudup was requested to appear in court and he advised the Court he wished to make a supersedeas bond and asked if he would be permitted to do so. The Court assured him the request would be granted, and the Court advised him the judgment would be written up and that a record would be made for his appeal. 5. The judgment of contempt and punishment was necessary in the administration of Justice and to maintain decorum and respect for the Court and was used only in the exercise of a sound Judicial discretion and only with the utmost sense of responsibility and circumspection. The trial Judge afforded Attorney John N. Crudup

an opportunity to purge himself of contempt or to offer an explanation or extenuation of his misbehavior and contemptuous conduct. Although the contempt was knowingly, wilfully and intentionally committed in the immediate presence, sight and hearing of the Court, the trial Judge nevertheless in the exercise of a sound judicial discretion and with the utmost sense of responsibility and circumspection inquired if he had any reason to give why he should not be punished for contempt. Attorney Crudup refused to speak in explanation, mitigation or extenuation of his contemptuous conduct but stubbornly and defiantly spoke in resentment and defiance of the Court by arguing that he was not in contempt of the Court. 6. The proceedings were not reported by a Court Stenographer but the facts, rulings, orders, decisions and proceedings recorded, reported and shown in the Judgment of contempt signed nunc pro tunc February 26, 1962, for February 23, 1962, and the facts, rulings, order, decisions, and proceedings recorded, reported and shown herein, are all within the personal knowledge of the trial Judge and are true. 7. The February 1962 Term of the City Court of Hall County, Georgia is still open and the record in this case is being completed during the same term the contempt proceedings occurred. This Amendment of the Judgment signed nunc pro tunc is dated and signed on March 24, 1962. s/ Joseph H. Blackshear, Judge City Court, Hall County, Georgia."

The second order is null and void as the majority evidently considered it. The original contempt judgment is erroneous for the reasons stated. I dissent from the judgment of affirmance.

Nicols, P.J., concurs in the dissent.